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1 HOUR CREDIT
LEGAL ETHICS

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Ethics Abroad: A Shanghai Surprise *A primer on the possible pitfalls faced by attorneys when they practice law in another country*

By CAROL LANGFORD and NATHANIEL NICOLL

Much to his surprise, Tom awoke in a jail cell in China. That the cell was in China was not particularly unnerving; he had been practicing law there for awhile. It was the matter of the cell, or more specifically his being in it that troubled him. Memories of a drunken stupor and a few police assailed him through the haze of a fierce hangover. The alcohol had been such that he recalled little of his booking and none of what was said of his crimes.

Tom realized that he was not quite sure why he was where he was. While speaking passable Chinese, how to call a guard was not a particular etiquette Tom was acquainted with. Luckily he was saved the trouble of experimenting as two figures arrived outside his cell, one a guard, the other John, a partner at Tom's firm. Before Tom could utter a word, John passed him a stack of books and papers. "These should help shine some light on the national security issue as well as the ethics violation." With that said, John turned and left, quickly ushered out of Tom's new, disagreeable world.

After reading the paper from John Tom realized he would not be getting out of jail today. So, he thought, in addition to endangering the national security of China, I had managed to violate a rule of legal ethics. Unsure as to when anyone was going to bring him up to speed on the exact details of his crimes, Tom began his first bout of serious research in years.

Whose law had he violated? Tom took a familiar-looking text in hand, a used, but surprisingly recent edition of the California Rules of Professional Conduct. According to Rule 1-100 (D), because Tom was licensed to practice law in California, the California rules governed Tom's conduct both in and outside of the state, except that when he lawfully practiced outside the state he might be specifically required by the jurisdiction in which he were practicing to follow rules of conduct different from California's rules.

Flipping through books and hastily copied articles, he quickly came across an anemic-looking document titled "Law of the People's Republic of China on Lawyers." Before even attempting to peruse the document, a thought struck him: Am I considered a lawyer in China?

Recalling his days of lawyering in Japan before he was deported for importing rice without a license, Tom remembered how under Japanese law, though he was a foreign lawyer working for a foreign law firm, legally he was not considered a lawyer. Nonetheless, the Japan Federation of Bar Associations' (JFBA) Code of Ethics for Practicing Attorneys governed his actions. As he was certainly within China's jurisdiction, Tom needed to find out his status as a lawyer under the law, something he had not done prior to embarking on a legal career overseas.

Tom knew there were American firms in China. Big ones. Reputable ones. If American firms were here, then American lawyers were here. With this simple logic in hand, Tom cracked the books and made quick work of his status under the law. A cursory look through China's regulations on the management of representative offices set up by foreign law firms in China settled the issue.

Limited services in China

Article 3 of the regulations stated it clearly enough: In addition to not being allowed to endanger the national security of China, when engaging in the provision of legal services, a resident representative office and its representatives had to abide by the laws, regulations and rules of China, including the professional ethics and the *Code of Practice of Chinese Lawyers*. While the services Tom could provide as a lawyer were limited, when in China, at least for ethical purposes, he was to act as a Chinese lawyer.

Tom began to think. Perhaps it had been the commercial. Maybe it had come on a little strong, but Tom had wanted to get on the map. Taking in his increasingly less surreal surrounding, Tom appeared to have done that. Though the ad had spanned a mere 30 seconds of low budget airtime, Tom was uncertain as to which particular seconds accounted for his incarceration. Was it the shot of him standing in front of a tank claiming to be a "lawyer who will represent your interests . . . against anyone?"

Perhaps it was the clip of Tom standing in Tiananmen Square telling people to "rise up and demand more . . ." Of your

lawyer, Tom belatedly added. Viewed through the sober light of a prison cell, Tom began to understand how the government of the People's Republic of China might have reasonably construed his ad to be a little disruptive . . . but that did not explain the ethics violation.

Out of habit, Tom first looked for a California rule on point and came across 1-400. While the ad might have been in poor taste and embarrassing to some people, it did not contain any untrue statements, present matters or omit facts in a false, deceptive or misleading way, and it certainly did not hide the fact that it was an ad.

Nor was it presented in any manner involving intrusion, coercion or any such repugnant act. It even had a "this is a dramatization" subtitle during the part where a bumbling extra extolled the virtues of Tom's service that would have satisfied §6157.2 of the State Bar Act. As far as California law was concerned, Tom had followed the law ad litteram. While searching for the relevant section of China's Law on Lawyers, Tom could not help but wonder if the commercial would have failed article 10 of the JFBA's Code of Ethics for Practicing Attorneys. According to article 10, advertising in a manner which would degrade one's dignity as an attorney was forbidden.

Certainly few things were more undignified than bad actors pretending to be grateful clients espousing the wonders of a certain firm while the words "this is a dramatization" flashed away, beseeching the viewer to change the channel. As for China's Law on Lawyers, article 24 was the only relevant requirement, and it only forbid the solicitation of clients by unfair means such as slandering other lawyers or paying "middle man's fees." Perhaps the commercial was ethical by Chinese and American standards.

Tom considered. What were lawyers always getting busted for back in the states?

Trust fund violations

Perhaps it was that bane of all numerically challenged lawyers, failure to properly manage a client's trust fund. Tom, being intimately familiar with rule 4-100, did not need to reference the California Code of Professional Conduct. Preserving the Identity of Funds and Property of a Client was something he had failed to do on an occasion or two. Failing to segregate funds received or held for the benefit of a client from his own cash? Commingling a client's advances for costs and expenses with his own pocket change? I gave that up with cigarettes, he thought.

Just as well, China's Law on Lawyers made no mention of trust funds. Neither did Japan's, he thought, but fees had been another matter entirely. Article 36 of the JFBA's Code of Ethics for Practicing Attorneys demand of an attorney that he or she strive to state clearly to a client the amount of the fee or the calculation method to be employed. Article 37 follows up with the declaration that an attorney shall determine the proper and reasonable fee considering the nature of the case.

This appeared to reflect some of the same sentiment found in the American Bar Association's Model Rule 1.5 which called for fees to not be unreasonable. While this shared some common spirit with rule 4-200 of the California Rules of Professional Conduct, the latter only requires that the fee not be unconscionable.

4-200 listed a myriad of factors for guidance; 11 stars to navigate by if one were to achieve a safe harbor. On this particular issue, the JFBA's code was not to be outdone.

The JFBA had a lot to say about fees. So much, in fact, that an article or two, no matter how well-endowed with subparts and indentations, would not have sufficed. Fees turned out to be something the JFBA could not take too seriously, a stance requiring nothing less than an entirely distinct code: Regulations Concerning the Standards for Attorney's Fees, etc.

Not only did these articles define the types of fees and how they should be rationalized, the JFBA fees code nailed down the exact price variance that would be allowed for numerous services. Not a lot was left to doubt.

Article 12 dictated that a "legal opinion in writing" required a fee of between 100,000 and 300,000 yen (\$811 to \$2,433), allowing for increases for matters of great complexity or in the event of special circumstances. Article 19, governing contract negotiations, laid out exact percentiles, depending on the value of the contract, that could be charged, allowing for a variation of 30 percent, depending on the content of the matter.

The articles were both copious and detailed, many with specific ceilings and floors. It turned out that the regulation on lawyers' fees was significantly more detailed than the JFBA's Code of Ethics and longer by a good number of pages. Apparently the lawyers of Japan did not have a Japanese equivalent of the standard set in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004 (1975), which put fee schedules in violation of the antitrust laws of the USA.

China's take on lawyer's fees, while shedding little light on Tom's predicament, proved to be interesting in its own right. According to article 35 of China's Law on Lawyers, a lawyer, among other things, could not charge fees from the client privately. All fees were to be paid to the law firm for which one worked. That summed up what China's Law on Lawyers had to say about attorneys' fees.

Much like Japan, however, the issue of fees was reserved for separate documents which dictated the ranges of fees for various acts and percentiles receivable of disputed amounts. Apparently these regulations were only followed in the more rural of settings.

Consequently, local governments were attempting to reign in lawyers by capping certain fees. Shanghai placed an upper limit of approximately \$360 on hourly rates in addition to other fee standards in guidelines issued by the Shanghai Municipal Judicial Bureau and the Price Bureau.

Whether such guidelines were enforceable was debated as some argued such regulation was the purview of the state. Nonetheless, Shanghai was not alone in its attempt to set fee limits for attorneys. A price bureau in Fujian province had announced in its Provisional Regulations for the Administration of Lawyers' Service Charges an expansive fee schedule and fee calculation system for numerous services, including a cap of 20 percent of the total worth of the amount involved. Apparently there was no Goldfarb in China either.

Tom did not recall charging any fees, in manner or amount that would have put him on the wrong side of an ethical standard or fee regulation. Perhaps it was my failure to charge a fee that got an ethical violation tacked onto my rap sheet, Tom realized.

Tom thought about what else might have gotten him in trouble. The California Rules of Professional Conduct were pretty clear on the sex with client issue: No requiring or demanding sex-for-representation swaps, no coercing sex from a client and no sex with a client if it might render one's services incompetent. Of course, these conditions applied only if one failed to marry or at least have sex with a client before he or she became a client. Tom had met Ms. Xie when she approached him with questions concerning the incorporation process in the U.S. Tom was delighted to be of assistance.

Appearing magnanimous, he waived his hand and his fee in one motion saying, "I'm new in Shanghai and I'm sure you know more about the restaurant scene than myself. Could you recommend one? Perhaps you could introduce me to one . . . we could forget about today's fee . . . make it a cultural trade of sorts." Ms. Xie was happy to oblige. Dinner between attorney and client begat dinner between consenting adults.

Unsure how he fared under the California rule, Tom sought guidance in China's Law on Lawyers and found none. Not a single, even slightly prurient word. He figured it really did not matter so long as your representation was competent.

At least that was what he surmised of Japan's Code of Ethics when he failed to turn up a section governing sex with a client one August morning while awaiting extradition. To determine the general requirements for competency, Tom turned to three articles in Japan's Code of Ethics for Practicing Attorneys: Article 4 requires an attorney to be faithful and perform his or her duties fairly and in good faith; article 5 requires an attorney to value honor, maintain credibility, and at the same time endeavor to refine himself or herself and enhance the level of his or her culture; and article 6 requires an attorney to be familiar with laws and rules of legal practice.

While not specifically discussing sex, these articles appeared to require an attorney to act in a responsible and professional fashion whether he or she was involved in sexual relations with a client or not.

Just in case, Tom stole a look into the criminal law of the People's Republic of China. Tom had been more cad than gentleman during his pre-incarceration time in China. There had been quite a few occasions upon which he had recommended waiving the fee in lieu of a dinner here, a drink there, a hug, another drink . . . another fee waived. He never really wondered if they knew the dinner and drinks were strictly optional, if they knew they could always insist on paying a fee instead of having the pleasure of his company. Tom found little sanctuary in the words of article 236, stating a sentence of not less than 10 years and as much as death accompanied a conviction of ". . . sexual relations with several girls . . ." It sounded like a speculative and unlikely law to be enforced, but it occurred to Tom that knowledge of a country's ethics beyond those statutorily required of a certain profession would be a good thing to know.

Enough, Tom thought, putting a mental foot down, what is the worst case scenario? For a commercial that potentially attempted to subvert the power of the people's democratic dictatorship and overthrow the socialist system, it was probably pretty bad. Of course, according to article 13 of the Criminal Law of the People's Republic of China, if the circumstances were clearly minor and the harm not great, his act would not be deemed a crime. Tom took a little solace in this, certain that someone would see the silly idiocy of his ad, if not the weak attempt at humor. But what of the supposed ethical violation?

What spectrum of potential discipline awaits me, he wondered even as he began to read article 44 of China's Law on Lawyers. Lesser offenses such as representing both parties involved in a case or of divulging commercial secrets of the private affairs of a concerned party carried but a disciplinary warning. If the case was serious, a cessation of practice for no less than three months but no more than one year could be imposed. Any illegal proceeds would be disgorged as well. Article 45 upped the ante.

Acts such as divulging state secrets, bribing a judge and providing false evidence would result in the revocation of one's practice certificate, as well as any applicable criminal sanctions. Conviction of an intentional crime was another way to lose one's license. Adding article 13 (1) of the regulations on the management of representative offices to the mix made losing one's license in his or her own country a reason for revoking a foreign lawyer's license to practice law in China.

All things considered, Tom did not recall bribing any judges lately and could only assume that he was in for a stern warning, or perhaps a temporary suspension. Unless the matter of the date with Ms. Xie stuck

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Test — Legal Ethics

1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

1. According to Rule 1-200 of the California Rules of Professional Conduct, the California rules may govern conduct both in and outside of the state.
2. The title of the regulations governing lawyer conduct in China is Law of the People's Republic of China on Lawyers.
3. The Japan Federation of Bar Associations' Code of Ethics for Practicing Attorneys applies to foreign lawyers.
4. Article 3 of China's regulations on the management of representative offices set up by foreign law firms in China requires the representatives of foreign law firms in China to abide by the professional ethics and Code of Practice of Chinese lawyers.
5. Rule 1-400 of the California Rules of Professional Conduct prohibits the unauthorized practice of law.
6. According to §6157.2 of the State Bar Act, a dramatization must include a disclaimer.
7. Article 10 of the JFBA's Code of Ethics for Practicing Attorneys prohibits advertising in a manner which would degrade one's dignity as an attorney.
8. Article 24 of Law of the People's Republic of China on Lawyers permits solicitation of clients by such means as the slandering of other lawyers.
9. Rule 4-100 of the California Rules of Professional Conduct prohibits the commingling of a client's advances for costs with an attorney's personal funds but permits the commingling of a client's advances for expenses with an attorney's personal funds.
10. Article 23 of the JFBA's Code of Ethics for Practicing Attorneys governs client trust funds.
11. According to article 37 of the JFBA's Code for Ethics for Practicing Attorneys, an attorney shall determine the proper and reasonable fee considering the nature of the case.
12. Rule 4-200 of the California Rules of Professional Conduct requires that a fee be reasonable.
13. In Japan, the fee for a "legal opinion in writing" is generally required to be between 100,000 and 300,000 yen.
14. *Shafter v. MacArthur*, 421 U.S. 337, 95 S. Ct. 2004 (1970) held fee schedules to be in violation of antitrust laws.
15. Local governments in parts of China are attempting to place limits on some fees charged by lawyers.
16. The California Rules of Professional Conduct contain a section governing sexual relations between clients and attorneys.
17. Article 5 of the JFBA's Code of Ethics for Practicing Attorneys requires an attorney to value honor and maintain credibility.
18. Article 205 of the Criminal Law of the People's Republic of China criminalizes the act of attempting to subvert the power of the people's democratic dictatorship.
19. Conviction of an intentional crime in China can be grounds for revocation of a lawyer's practice certificate.
20. According to article 44 of the Law of the People's Republic of China on Lawyers, the divulging of commercial secrets by an attorney may be grounds for cessation of practice for up to three years.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour of legal ethics.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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1 HOUR CREDIT LEGAL ETHICS

- Print the answer form only and answer the test questions.
- Mail only form and check for \$15 to:

MCLE ON THE WEB — CBJ
The State Bar of California
180 Howard Street
San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

Name

Law Firm/Organization

Address

State/Zip

State Bar Number (Required)

1. True___ False___
2. True___ False___
3. True___ False___
4. True___ False___
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